80-967

No.

Supreme Court, U. S.
FILED
DEC 15 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

HOSPITAL AND INSTITUTIONAL WORKERS UNION, LOCAL 250,
Petitioner,

VS.

PASATIEMPO DEVELOPMENT CORP.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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QUESTION PRESENTED

May a union force a successor employer to arbitrate the discharge of an employee under the grievance and arbitration procedure of the predecessor's collective bargaining agreement which occurs during the interim between the assumption of the business by the successor and the consummation of a new agreement?

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Hospital and Institutional Workers Union, Local 250, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the Court of Appeals is reported at 627 F.2d 1011 and appears as Appendix A. The District Court did not enter written findings but portions of its oral findings are reprinted as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on September 17, 1980. Jurisdiction of the Court is invoked under 28 U.S.C. § 1254 (1).

A STATEMENT OF THE CASE

When Pasatiempo Development Corp. took over Pine Towers Convalescent Hospital in San Francisco on November 1, 1976, the hospital was operating under an oral extension of an expired collective bargaining agreement between the prior owner, Western States Convalescent Hospitals and Hospital and Institutional Workers Union, Local 250.

Three weeks after the change in ownership which was accompanied by no change in employees, operations, supervision or working conditions; Pasatiempo's attorney, J. Richard Thesing, met with a Local 250 business representative to initiate discussions on a successor collective bargaining agreement. Mr. Thesing assured the business agent that Pasatiempo would "not make any changes in the wages or benefits as we were required to do as a successor, unless we first negotiated with them about them."[1] After the initial contact, negotiations ensued which ultimately led to a new collective bargaining agreement between Pasatiempo and Local 250 covering Pine Towers (and several other facilities) retroactively effective to February 1, 1977.

During that interim period of three months a worker, Sadie Herndon, was discharged in December of 1976. A formal written grievance was filed which resulted in two grievance meetings with management and Local 250. When

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[1]The business agent's testimony was that Mr. Thesing assured him that there would be no changes in the Western States contract pending negotiation of a new contract. For purposes of this Petition, it is not necessary to resolve this factual conflict.

no resolution was reached, the union demanded arbitration.[2] Mr. Thesing's response on behalf of Pasatiempo was as follows:

> Dear Mr. Dixon:
>
> Your letter to Mrs. Pung regarding Sadie Herndon has been forwarded to me for reply. The three arbitrators which you have proposed are not acceptable. Please have the person who will be handling this matter on behalf of Local 250 contact me with regards to the selection of a mutually agreeable arbitrator.
>
> Very truly yours,
>
> J. Richard Thesing

Subsequently, after the new agreement was consummated, Pasatiempo changed its position and refused to arbitrate the discharge. Local 250 filed a Petition to Compel Arbitration in a California State Court which was removed to the District Court by Pasatiempo.

The District Court concluded that since no specific understanding had been reached between Mr. Thesing and the Local 250 business representative that Pasatiempo would be bound by the arbitration provision of the prior Western States agreement while negotiations continued for a new contract, the successor would not be compelled to arbitrate the discharge case. The District Court recognized however, "that there was an agreement to continue certain of the provisions of the prior contract."

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[2]Both the Western States and Pasatiempo contracts provided for final and binding arbitration. The Pasatiempo agreement modified the preliminary steps of the grievance procedure. Both contracts limited discharges to "just cause" situations.

The Ninth Circuit's affirmance is founded upon the District Court's factual finding that no specific understanding was reached that Pasatiempo would abide by the arbitration provision of the contract until a new agreement was consummated. App. p. A-3.

As we shall demonstrate, this case presents an important issue left undecided by the Court's holding in *NLRB v. Burns Int'l Security Service, Inc.*, 406 U.S. 272 (1972) and which has led to confusion and conflict between the Courts of Appeals and the National Labor Relations Board. Precisely stated, may the union enforce under 29 U.S.C. § 185 an obligation to arbitrate during the interim period when no contract exists but during which the employer is obligated not to alter terms and conditions of employment?

REASONS WHY THE WRIT SHOULD BE GRANTED

1. *NLRB v. Burns Int'l Security Services, Inc., supra,* holds that a successor employer is not prohibited from changing the terms and conditions of employment when it takes over a business. As this Court however emphasized, once the successorship status is recognized, the new owner may not alter terms and conditions of employment without first bargaining with the union representing the employees. 406 U.S. at 293. See also, *NLRB v. Bachrodt Chevrolet Co.*, 468 F.2d 963 (7th Cir. 1972), remanded, 205 N.L.R.B. 784, *enforced,* 515 F.2d 512, *cert. den.* 423 U.S. 927 (1975).

Here Pasatiempo promised not to make any changes, and as far as the record reveals made little if any changes

before the new agreement was reached.[3] Having failed to initially reject the arbitration clause (and any other substantive provision), *Burns* teaches that any subsequent change would be unlawful absent bargaining.

This rule is coupled with that of *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543 (1964) where a successor employer was compelled to arbitrate a dispute arising under the provisions of a contract between the union and an employer which merged into the successor company. Had Sadie Herndon been discharged just prior to November 1, 1976, Pasatiempo would have been obligated to arbitrate the merits of the discharge and be bound by the remedy. See also, *Golden State Bottling Co. v. NLRB,* 414 U.S. 168 (1973). *Wiley & Sons* instructs that at least the substantive duty to arbitrate survives in a successor situation even if as *Burns* holds the successor employer is not prohibited from making initial changes or subsequent changes after good faith bargaining.[4]

2. As this Court recognized, Section 158 (a)(5) of the National Labor Relations Act prohibits a successor employer from making unilateral changes without appropriate

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[3]The administrator testified that "step" increases were not given although there was no evidence any employee was due them or that the union was aware of any such failure. Although counsel for Pasatiempo stipulated that dues were paid to the union under a checkoff provision, the District Court expressed some doubt on the union's independent proof of this. Otherwise there was compliance with the Western States Contract in effect when Pasatiempo took over.

[4]When no successorship occurs, no obligation to bargain arises. *Howard Johnson Co. v. Detroit Local Joint Executive Board,* 417 U.S. 249 (1974).

bargaining with the employee union *NLRB v. Burns Int'l Security Services, supra.*[5] Where such a unilateral change occurs the remedy imposed by the National Labor Relations Board is an order reinstating the *status quo* substantially the same order as if the previous contract were enforced under 29 U.S.C. § 185.

The confusion which this Petition seeks to have this Court clarify arises partially from the Board's own indecision with respect to the survivability of the arbitration requirement. Initially the Board took the position that it would enforce the obligation to accept grievances, but not to submit them to binding arbitration. *The Hilton Davis Chemical Company,* 185 N.L.R.B. 241 (1970). That doctrine has now been recently overruled. *American Sink Top & Cabinet Co. Inc.,* 242 N.L.R.B. No. 53 (1979).

3. When faced with this issue within the context of a suit brought under 29 U.S.C. § 185, the federal courts have reached conflicting results whether it is the arbitration requirement or the substantive provision which the union seeks to enforce. These cases arise when there is an interim period between contracts either with the same or a successor employers but when both are under the same obligation not to unilaterally change conditions. Some courts have refused to enforce such contractual obligations, *Oil, Chemical & Atomic Workers Int'l Union v. American Maize Products Co.,* 492 F.2d 409 (7th Cir. 1974), *cert. den.,* 417 U.S. 969 (1974); *Proctor & Gamble Independent*

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[5]See also *Zim's Footliner Inc. v. NLRB,* 495 F.2d 1131 (7th Cir. 1974), *cert. den.,* 419 U.S. 964 (1974) and *NLRB v. Edjo Inc.* ... F.2d ..., 105 LRRM 3001 (9th Cir. 1980).

Union v. Proctor & Gamble Manufacturing Company, 312 F.2d 181 (3rd Cir. 1962), *cert. den.,* 374 U.S. 830 (1963); *General Warehousemen, Local 636 v. J. C. Penney Co.,* 484 F.Supp. 130 (W. D. Pa. 1980); *Milwaukee Typographical Union v. Madison Newspaper,* 444 F.Supp. 1223 (W. D. Wisc. 1978); *I.B.E.W. v. Wadsworth Electric Manufacturing Co.,* 240 F.Supp. 292 (E.D. Kan. 1965).

Others have indicated a willingness to enforce such obligations where a successorship occurs or have enforced such obligations. *General Teamsters Local No. 249 v. Bill's Trucking Inc.,* 493 F.2d 956 (3rd Cir. 1974); *United Steelworkers v. United States Gypsum Co.,* 492 F.2d 713 (5th Cir. 1974) *United Steelworkers v. Reliance Universal, Inc.,* 335 F.2d 891 (3rd Cir. 1964); *Wackenhut Corp. v. Plant Guard Workers Union,* 332 F.2d 954 (9th Cir. 1964); *Washington-Baltimore Newspaper Guild v. Washington Post,* 442 F.Supp. 1060 (D. D.C. 1977); *Newspaper Guild v. Central States Publishing Co.,* 451 F.Supp. 1112 (E.D. Pa. 1978) and *Local 1115 Joint Board v. B & F Investments,* 436 F.Supp. 1203 (S.D. Fla. 1977).

The Court's reliance upon the District Court's finding that there was no specific agreement to arbitrate formed in the meeting between the union representative and Mr. Thesing is not dispositive since it is the legal obligation imposed on the successor not to change conditions which is the basis of the obligation to arbitrate. Similarly, since Local 250 and Western States were operating on an oral extension of their contract, its expired status did not affect

the obligations of the successor who took over the facility with knowledge of the contract.[6]

4. This confusion arises out of the effort made in *NLRB v. Burns Int'l Security Service, supra,* to distinguish *John Wiley & Sons, Inc. v. Livingston, supra.* By noting that the former case did not arise in the context of a suit premised upon 29 U.S.C. § 185, *Id.* at 285, this Court created a tension between two provisions of the National Labor Relations Act, Sections 158(a)(5) and 185, which must be harmonized. See, *Howard Johnson Co. v. Hotel Employees, supra,* 417 U.S. at 255-56 and 262 n. 9.

Subsequent courts have noted the seemingly divergent results. *United Steelworkers of America v. United States Gypsum Co., supra,* 492 F.2d at 725-27 and *Boeing Co. v. Int'l Association of Machinists,* 504 F.2d 307, 322 (5th Cir. 1974).

5. Unions and employers are now left with uncertainty as to their obligations during such an interim period. May an employer take action which violates the contract without fear of submitting the dispute to arbitration? Conversely, may a union take economic action even if an arbitration procedure exists to force settlement of a dispute notwithstanding a no-strike obligation?[7] May the

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[6]When Mr. Thesing met with the business representative he had a copy of the Western States agreement which contained a "successors" clause requiring a successor to "agree" to all terms of the Western States contract. See, Section 24, as amended by letter of July 25, 1974. Certainly Local 250 could have enforced the collective bargaining agreement against Western States based on the oral extension.

[7]See, *Teamsters Local 174 v. Lucas Flour Co.,* 369 U.S. 95 (1962).

union institute a civil action to remedy a breach of contract under 29 U.S.C. § 185 without exhausting a grievance and arbitration procedure if the parties have not expressly agreed to continue it in effect until a new agreement is reached?

Ripe for decision is the unanswered question posed in the petition: May the obligation to arbitrate be enforced against an admitted successor through arbitration where the dispute arises before the union and employer consummate a new agreement? If nothing else the federal labor policy of encouraging resolution of disputes through arbitration compels a clear delineation of the obligations of the respective parties. *Cf. Nolde Brothers, Inc. v. Local 358 Bakery & Confectionery Workers Union,* 430 U.S. 243 (1977).

CONCLUSION

This Court should harmonize the disparate treatment of the obligations of successors under federal labor law which have developed. This case poses a narrow but significant issue which becomes more important as businesses are transformed in periods of economic change.

For the reasons suggested above, the Petition for a Writ of Certiorari should be granted.

Dated, December 13, 1980

Respectfully submitted,

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Attorneys for Petitioner

(Appendix Follows)

Appendix A

United States Court of Appeals
For the Ninth Circuit

No. 78-3252

DC # C-78-728

Hospital and Institutional Workers Local 250,
Plaintiff-Appellant,
vs.
Pasatiempo Development Corp.,
Defendant-Appellee.

[Filed September 17, 1980]

OPINION

Appeal from the United States District Court
for the Northern District of California

Honorable Robert H. Schnacke, District Judge, Presiding
Argued and submitted September 10, 1980

Before: BROWNING, Chief Judge, KENNEDY, Circuit Judge, and HOFFMAN,* District Judge

PER CURIAM:

Hospital and Institutional Workers Local 250 (the Union) appeals the denial of its petition to compel arbitra-

*Honorable Walter E. Hoffman, Senior Judge, United States District Court for the Eastern District of Virginia, sitting by designation.

tion pursuant to § 301 of the Labor Management Reporting Act. The Union sought arbitration to resolve a dispute over Pasatiempo's discharge of one of its employees from a convalescent hospital. When the discharge occurred, Pasatiempo had just purchased the facility from an owner whose collective bargaining agreement with the Union had expired. Although Pasatiempo and the Union negotiated a new contract, its effective date was after the discharge.

As the Union concedes, *NLRB v. Burns International Security Service*, 406 U.S. 272 (1972), and *Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249 (1974), establish that a successor employer is not bound by the substantive terms of a collective bargaining agreement unless it expressly or impliedly assumes them. Because the contract had expired when Pasatiempo discharged the employee, we have no occasion to consider the applicability of cases in this circuit that may have suggested that a contractual duty to arbitrate under an existing contract might survive a change in ownership. *See Bartenders & Culinary Workers Local 340 v. Howard Johnson Co.*, 535 F.2d 1160, 1164 (9th Cir. 1976) (Sneed, J., concurring); *Wackenhut Corp. v. International Union United Plant Guard Workers*, 332 F.2d 954, 958 (9th Cir. 1964). Nor are we persuaded that the statutory duty to bargain in good faith obligates an employer in Pasatiempo's situation to arbitrate. *See NLRB v. Bachrodt Chevrolet Co.*, 468 F.2d 963, 969 (7th Cir. 1972), *remanded*, 205 N.L.R.B. 784, *enforced*, 515 F.2d 512 (7th Cir.), *cert. denied*, 423 U.S. 927 1975).

The Union contends that certain conduct by Pasatiempo should be regarded as an agreement to arbitrate. Pasatiempo's maintenance of terms and conditions of employment, including the settling of employee grievances short of arbitration, was consistent with its statutory duty as a successor employer to bargain with the incumbent union. This conduct, and any oral commitments to this effect, are not sufficient to imply an agreement to be bound by the predecessor's expired contract, including the arbitration terms. *See General Warehousemen & Employees Local 636 v. J.C. Penney Co.*, 484 F. Supp. 130, 135 (W.D. Pa. 1980).

A Pasatiempo representative may have initially indicated the company's willingness to arbitrate the discharge dispute even though it was not obligated to arbitrate. That action, however, does not constitute, as a matter of law, an objective manifestation of an agreement to arbitrate. The case turns upon factual issues and the trial court's finding that there was no agreement is not clearly erroneous.

AFFIRMED.

Appendix B

[Transcript Aug. 25, 1978]

THE COURT: The burden is clearly on the party seeking arbitration to establish there had been an agreement by the party to arbitrate. It's a relatively heavy burden, I would think.

There has been shown that there was an agreement to continue certain of the provisions of the prior contract, but it was clear that the method customarily used to carrying forward all of those provisions with a written extension of the existing contract, was not accomplished by the parties. Something short of that was done.

What was done short of that, I am not sure of in its totality. But certainly there was no discussion at that time of continuing the entire contract and there was no precise discussion about continuing the arbitration provisions of the prior contract.

Absent either a total extension or some agreement indicated at the time that the arbitration provisions were to be imposed upon successor to this business, I would feel that no showing had adequately been made that they were bound by any such provision.

So the finding will be for the respondent. The petition to compel arbitration will be denied.